inception to its completion is confirmed by the language of the statute and by judicial decisions.").

As common sense would suggest, "a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate." *In re GTE Tel. Operating Cos.*, 13 FCC Rcd. 22,466, at ¶22.[7] Generally, as a matter of Constitutional law, it is well-established that the determination of whether an action – be it a phone call or the transportation of goods over roadways – may be characterized as interstate, and therefore within the scope of the federal government's sphere, is dependent upon the physical, geographic locations in which the action takes place. *See, e.g., Western Union Tel. Co. v. Speight*, 254 U.S. 17, 18 (1920) ("The transmission of a message through two states is interstate commerce as a matter of fact."); *Hanley v. Kansas City S. Ry. Co*, 187 U.S. 617, 620 (1903) (the transportation of goods outside of the state constitutes interstate commerce); *Black's Law Dictionary* 819 (6th ed. 1990) (defining "interstate" as "Between two or more states; between places or persons in different states; concerning or affecting two or more

[7] The FCC documents that SBT relies upon in support of its argument that FCC is competent to determine the meaning of "where jurisdiction can be determined from the call detail" in SBT's federal tariff – a point that no one disputes but is irrelevant to the question at hand – similarly demonstrate that the actual locations of the end points of a communication, as accurately determined as practicable, determine the jurisdictional nature of a call. *See, e.g., In re Determination of Interstate and Intrastate Usage of Feature Group A & Feature Group B Access Serv.*, 4 FCC Rcd. 8448, at ¶¶ 8, 13 and n.14 (Dec. 5, 1989) (referring to EES method as "best available technique" and "best nationwide measurement approach available in terms of accuracy" to determine end points of calls, and noting that "'[f]alse' intrastate traffic describes the situation in which a call appears to be intrastate in nature from IXC call detail information but is, in fact, an interstate call."); *In re Southwestern Bell Tel. Co. Revisions to Tariff F.C.C. Nos. 68 & 73*, 7 FCC Rcd. 3456, at ¶¶ 6-7 (May 19, 1992) (stressing need for "highest level of accuracy"); *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 11 FCC Rcd. 15,499, at ¶ 1044 (Aug. 8, 1996) (noting that "using current technology, it may be difficult ... to determine ... which cell site a mobile customer is connected to, let alone the customer's specific geographic location" and that the geographic location of the mobile customer is key to determining applicable access charges).

states politically or territorially" and defining "interstate commerce" as "Commerce between a point in one State and a point in another State . . . .").

With respect to telephone calls specifically, both the FCC and the Courts have consistently focused on the geographic locations of the end-points of the calls – the physical location of the calling party and the called party – to determine whether a call is interstate or intrastate. For example, *In re Rules and Policies Regarding Calling Number Identification Service – Caller ID*, 10 FCC Rcd.11,700 (May 5, 1995), the FCC noted that it would not be possible to determine the jurisdictional nature of telephone calls to non-geographically assigned phone numbers (such as 500, 700, 800, and 900 numbers) as proposed by switch manufacturers because the information "about the *geographical location* of the called party" would not be available to the party responsible for determining jurisdiction, making it impossible for that party to properly characterize the calls as intrastate or interstate. 10 FCC Rcd. 11,700, 11,726-27 (emphasis added). *See also, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1497-98 (D.C. Cir. 1984) (upholding FCC assertion of jurisdiction under the interstate commerce clause over facilities located within a single state – intrastate facilities – that would be used "to terminate communications which originate in other states"); *North Carolina ex rel. Utils. Comm'n v. Thrifty Call, Inc.*, 571 S.E.2d 622, 629 (N.C. Ct. App. 2002) (noting that "a debit card call that originates and ends in the same state is an intrastate call, even if its processed through an 800 switch located in another state") (*quoting In re the Time Machine Inc.*, 11 FCC Rcd. 1186, 1190 (1995)); *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, 14 FCC Rcd. 3689, 3702 (Feb. 26, 1999) (noting that while "a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate[,]"

determining jurisdiction of specific Internet traffic is difficult because of difficulties in "identifying the geographical destinations" of such traffic but concluding using "end-to-end" analysis that a substantial portion of Interstate traffic is interstate), *vacated on other grounds*, *Bell Atl. Tel. Co. v. FCC*, 206 F.3d 1, 3 (D.C. Cir. 2000); *Petition for Emergency Relief & Declaratory Ruling Filed by BellSouth Corp.*, 7 FCC Rcd. 1619 (Feb. 14, 1992) (finding that calls to a voice mail service are jurisdictionally interstate because "[w]hen the caller is out-of-state, there is a continuous path of communications across state lines between the caller and the voice mail service"); *In re New York Tel. Co.*, 76 F.C.C.2d 349, at ¶6 (noting that calls originating at a subscriber's premise in New York and terminating at a location in Washington are interstate in nature).

Accordingly, the phrase "where jurisdiction can be determined from the call detail" is easily interpreted in this case. First, long-established law declares that jurisdiction is based on the geographic location of the originating and terminating points of the call.[8] Second, SBT agrees and admits that, in the case of mobile phone calls, the originating number contained in the "call detail" does not reflect the geographic location of the origination point. This leads to the unavoidable conclusion that "jurisdiction *cannot* be determined on the basis of call detail." That determination leads, in turn, to the conclusion that for mobile phone calls the correct portion of the tariff is the one that applies to calls "where jurisdiction cannot be determined on the basis of call detail." There is nothing in this interpretive process that is outside the experience or capability of a federal judge, nor is it within the peculiar expertise of the FCC.

[8] Even if determining the proper scope of federal and state jurisdiction based upon distinctions between intrastate and interstate commerce was not within the conventional experience of the courts, because the FCC has established a clear policy regarding the determination of jurisdiction based upon the geographic locations of the calling and called parties, the primary jurisdiction doctrine would still have no application. *See, e.g., Tak Communications, Inc. v. New Bank of New England, N.A.*, 138 B.R. 568, 579 (W.D. Wisc. 1992).

### B. There Are No Prior Applications to the FCC and No Concern for Inconsistent Rulings.

The third and fourth factors considered by the courts in determining whether the primary jurisdiction doctrine applies – whether there exists a danger of inconsistent rulings disruptive of a statutory scheme and whether a prior application to the agency has been made – similarly do not support referral in this case. Global Crossing has filed suit both in this Court and in the United States District Court for the Northern District of Georgia. There is no complaint pending before the FCC, however. In such a situation, there is no risk of inconsistent rulings for purposes of primary jurisdiction analysis and the third factor therefore does not support referral. As the Supreme Court explained long ago, "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or writ of certiorari; and thereby uniformity in construction may be secured." *Great N. Ry. Co.*, 259 U.S. at 290-91.[9] Similarly, because it is undisputed that no "prior application" has been made to the agency, the fourth factor has no application. *See, e.g., AT&T v. United Artists Payphone Corp.*, 1990 WL 200653, at *6. Accordingly, referral of Global Crossing's claims to the FCC pursuant to the doctrine of primary jurisdiction is inappropriate, and SBT's motion to dismiss or stay Global Crossing's complaint on that basis should therefore be denied.

[9] In contrast, in cases where the same question is pending before the FCC and the courts, as for example in *Southwestern Bell Telephone Co.*, 789 F. Supp. 302 (E.D. Mo. 1992), the risk of unnecessary, inconsistent rulings is present, and referral would be appropriate. *See* note 5, *supra*.

## III. Even if the Primary Jurisdiction Doctrine Were Applicable Here, the Complaint Should be Stayed Rather than Dismissed.

When a court determines that referral to an administrative agency is appropriate under the primary jurisdiction doctrine, the judicial action is generally stayed, not dismissed, pending administrative resolution of the issues referred to the agency. *E.g., United States v. Mich. Nat'l Corp.*, 419 U.S. 1, 4-5 (1974) (noting that "the common practice has been for the district court to retain jurisdiction but to stay proceedings" while awaiting decision both in abstention cases and cases referred to administrative agencies pursuant to the primary jurisdiction doctrine); *Am. Ass'n of Cruise Passengers v. Cunard Line, Ltd.*, 31 F.3d 1184, 1187 (D.C. Cir. 1994) ("In general, when primary jurisdiction lies with an administrative agency, the district court should stay the proceedings in front of it, not dismiss the suit."). *See also, e.g., General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940); *GTE.net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141, 1148 (S.D. Cal. 2002).[10] The referring court generally prepares an order that outlines the issues upon which the agency's opinion is sought. *E.g., Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, No. Civ.A. 00-477, 2002 WL 1837844, at *4 (E.D. La. Aug. 9, 2002) (*quoting Miss. Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 421 (5th Cir. 1976)).[11]

Courts may, in their discretion, dismiss without prejudice a case referred to an administrative agency, but only if the parties would not be unfairly disadvantaged thereby. *E.g.*,

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[10] A stay is generally appropriate given the possibility that the agency may be unwilling or unable to resolve the referred issue in a timely fashion. *E.g., Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 192 F.3d 778, 785-86 (8th Cir. 1999) (agency refused to resolve referred issue; district court retained jurisdiction).

[11] In this case, if primary jurisdiction were applicable, an appropriate issue for referral would be whether "jurisdiction can be determined from the call detail" where the call detail does not provide the geographic location of the calling party.

*Reiter v. Cooper*, 507 U.S. 258, 268 (1993) (dicta). In this case, dismissal would impose an unnecessary and unfair disadvantage upon Global Crossing for several reasons.

First, Global Crossing elected, pursuant to the express terms of section 207 of the FCA, to pursue its claims against SBT in this Court, and a litigant's choice of forum is generally entitled to deference. *E.g., Del. & Hudson Ry. Co. v. Consolidated Rail Corp.*, 654 F. Supp. 1195, 1203 (N.D.N.Y. 1987) (denying motion to stay or dismiss case pursuant to primary jurisdiction doctrine, noting that "deferral of this case, which would essentially require the plaintiff to proceed before the ICC, would deprive the plaintiff of his choice of forum").[12]

Second, in all likelihood referral of Global Crossing's claims to the FCC would delay resolution of the claims. Despite the requirement that FCC address complaints under the FCA within five months, the agency typically takes well over a year to resolve such complaints. *See* note 2, *supra*.

Third, section 207 provides unequivocally that a plaintiff may seek relief before *either* the FCC or the courts, but not both. 47 U.S.C. §207. As a practical matter, therefore, were this Court to dismiss Global Crossing's complaint, it would make little difference whether the dismissal was with or without prejudice, because Global Crossing would be statutorily barred from pursuing relief in this Court once its case was before the FCC. *See, e.g., In re Long Distance Telecomms. Litig.*, 831 F.2d at 632. As such, if its claims were referred to the FCC and

[12] *See also, e.g., Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997) ("In general, federal courts give considerable deference to a plaintiff's choice of forum . . . ."); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394-95 (8th Cir. 1991) (noting that in context of motion seeking change in venue, "[T]he Supreme Court has emphasized that trial courts must give deference to a plaintiff's forum choice" and that "the plaintiff's choice of forum should rarely be disturbed" and "jurisdiction should be declined only in 'exceptional circumstances'") (*quoting Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 508 (1947)); *Anheuser-Busch, Inc. v. All Sports Arena Amusement, Inc.*, 244 F. Supp. 2d 1015, 1022 (E.D. Mo. 2002) ("Courts generally give great deference to a plaintiff's choice of forum.").

dismissed by this Court, regardless of the outcome before the agency, Global Crossing would forever lose its right to have a jury decide upon the proper amount of damages recoverable as a result of SBT's overcharges.[13] Global Crossing would also likely lose the ability to recover attorney fees, as the FCA specifies that attorney's fee awards are to be fixed *by the court.* 47 U.S.C. §206. *See also AT&T Co. v. United Artists Payphone Corp.*, 852 F. Supp. 221, 224 (S.D.N.Y. 1994) (finding that §206 permits award of attorney's fees incurred pursuant to court proceedings, but does not permit recovery of fees incurred pursuant to FCC proceedings).

Fourth, dismissal would implicate the statute of limitations, at a minimum by reducing the time period for which Global Crossing would be able to pursue damages for overcharges. *See, e.g., Johnson v. Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996) (noting that where an "action has been dismissed without prejudice, a plaintiff's subsequent court filing is vulnerable to a time-bar because the dismissal in and of itself does not halt the running of the limitations period, even though designated to be without prejudice" but that "[t]he statute of limitations is not a concern where the deferring court has issued a stay – the action is simply reactivated, if necessary, after the administrative proceeding runs its course" ); *Flanigan's Furniture, Inc. v. N.Y. Tel. Co.*, No. 86-CV-796, 1987 WL 20302, at *1 (N.D.N.Y. Nov. 25, 1987) (noting that if plaintiff's case were dismissed, rather than stayed, pursuant to the primary jurisdiction doctrine, the two-year statute of limitations would be measured from the date of re-filing the complaint with the FCC, and as a result, the period for which plaintiffs could recover damages for alleged overcharges would be shortened). Finally, there would be no prejudice to either party in staying rather than dismissing the case. *See Am. Ass'n of Cruise Passengers*, 31 F.3d at 1187 (noting that dismissal on primary

[13] SBT criticizes Global Crossing for "arguing" "without any proof" that the overcharges outnumber undercharges. *See* Def.'s Mem. at 6. Global Crossing, of course, need not offer any "proof" of anything in opposition to a motion to dismiss. The point is that Global Crossing is entitled to develop that proof and present it to a jury.

jurisdiction grounds would be inappropriate, especially where the "district court could effortlessly hold the suit in abeyance pending the outcome of proceedings before the" agency). Thus, any referral to the FCC should be pursuant to a stay of this case, not a dismissal.

Moreover, given the delay inherent in referrals to administrative agencies, when a court stays an action pending resolution of issues referred to an agency pursuant to the primary jurisdiction doctrine, it is appropriate for the court to take steps to ensure that the case does not become unreasonably delayed by such referral. *See, e.g., Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1448 (3d Cir. 1991) (noting that parties would be able to seek relief from the district court if the FCC did not "undertake the proceedings necessary to resolve the issue the district court's order has referred to it within a reasonable time and proceed as expeditiously as possible to complete them"); *Red Lake Band of Chippewa Indians*, 846 F.2d at 476-77 ("To assure that the Secretary reaches a decision promptly, the district court shall retain jurisdiction over this matter and monitor its progress."); *Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 206 (5th Cir. 1988) (referring issue to FERC and staying matter for 180 days, allowing district court to adjudicate parties' rights without further deference to FERC in event agency ruling is not forthcoming within that time); *In re Wireless Tel. 911 Calls Litig.*, No. MDL 1521, 03 C 2597, 02 C 8808, 2003 WL 22057836, at *1-*3 (N.D. Ill. Sept. 4, 2003) (setting status conference for three months from date of referral); *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1102 (W.D. Mo. 2001) (staying case for ten months where the FCC was obligated to resolve issues within five months, and holding that "[i]f the FCC is unable or unwilling to resolve the issues presented ... within that time, then the Court will proceed...."); *Kranson v. Madison-Oneida Bd. of Coop. Educ. Servs.*, 735 N.Y.S.2d 739, 743 (N.Y. Sup. Ct. 2001) (noting that if agency did not resolve referred issues within four months, the court would

reassume jurisdiction and invite amicus briefs from the agency). Global Crossing respectfully submits that should this Court find the primary jurisdiction applicable, similar measures should be employed to ensure that resolution of Plaintiff's claims is not unduly delayed.

## CONCLUSION

Because this Court is competent to determine the meaning of "where jurisdiction can be determined from the call detail," and apply that meaning to undisputed facts – SBT admits that the "call detail" does not indicate the geographic location of a mobile phone caller but uses the call detail to determine jurisdiction nonetheless – the primary jurisdiction doctrine has no application in this case. SBT's motion to dismiss based upon that doctrine should therefore be denied. If, however, this Court concludes that referral to the FCC is appropriate, Global Crossing respectfully requests that this Court stay, rather than dismiss, its Complaint, to ensure that Global Crossing is not unduly prejudiced by such referral.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 18th day of May, 2004, the foregoing document was electronically filed with the Clerk of the Court, to be served by operation of the Court's electronic filing system upon the following attorney of record:

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By: s/Erik O. Solverud
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| SOUTHWESTERN BELL TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| v. | ) | Cause No. 4:92CV00088 SNL |
| ALLNET COMMUNICATIONS SERVICES, INC., | ) | |
| Defendant. | ) | |

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO STAY**

**INTRODUCTION**

Before the Court is defendant's motion to stay. Plaintiff alleges in its complaint that it provided defendant with certain telecommunications service for which defendant has refused to pay. The complaint alleges common law claims -- breach of contract, action on account and an account stated -- in addition to a federal claim arising under the Communications Act of 1934, 47 U.S.C. §151 et seq.

The sole basis for defendant's motion to stay is the contention that the Federal Communications Commission (FCC) has "primary jurisdiction" over the parties' dispute herein. Defendant is wrong. This case is a straightforward action to collect unpaid charges for service and does not implicate any of the considerations underlying the doctrine of primary jurisdiction. Moreover, the language of the Communications Act itself, the FCC, this Court, and even defendant's own prior admissions all support the conclusion that the present lawsuit belongs in this forum.

Defendant's motion to stay is not well-taken. For the reasons below, plaintiff requests the Court to deny the motion and to proceed with this action on the merits.

ARGUMENT

Although defendant contends that the FCC has "primary" jurisdiction over the instant dispute, in effect defendant is urging the novel proposition that the FCC has exclusive jurisdiction over this action. The law, however, takes a different view.

The Communications Act expressly creates a civil action for damages in a court of law. See 47 U.S.C. §§206, 207. Indeed, Section 207 of the Act states:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make a complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. (emphasis added)

By the plain language of the Act, Congress has given plaintiff the unequivocal right to pursue its claim for damages in this Court. Moreover, the choice of forum belongs to plaintiff, not defendant, although defendant by its present motion seeks to strip plaintiff of this statutory right. Defendant in its answer admits that it is a common carrier and that this action arises in part under the Communications Act. Plaintiff's claims therefore are

properly before this Court, pursuant to the express grant of Congress in the Communications Act.[1]

The premise of defendant's primary jurisdiction argument is the implicit assumption that the FCC will entertain plaintiff's attempt to collect charges from defendant. That assumption, however, is false. The FCC has stated that it will not be used as a forum for collection actions between common carriers, such as the parties herein. In Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri, Inc., 4 FCC Rcd 8338 (1989), the complainant filed a complaint with the FCC seeking damages from the defendant's disconnection of service. The defendant in turn filed a counterclaim seeking payment of unpaid charges for the service. Addressing the counterclaim, the FCC stated:

> We decline to order the requested relief for the reasons set forth in Illinois Bell Telephone Co. et al. v. AT&T et al. The complaint procedures make a carrier liable to a customer for damages that result from the carrier's unlawful actions or omissions. 47 U.S.C. §§206-209. However, this statutory scheme does not constitute the Commission as collection agent for carriers with respect to unpaid tariffed charges. In the normal situation, if a carrier has failed to pay the lawful charges for services or facilities obtained from another carrier, the recourse of the unpaid carrier is an action on contract to compel payment, or a termination

[1]Plaintiff's common law claims are also properly before the Court, as the Communications Act makes it clear that its provisions and remedies are coextensive with, or "in addition to", any existing common law remedies. See 47 U.S.C. §414.

> or disconnection of service until those charges have been paid. Accordingly, we decline to order this part of the relief requested in United's answer.

4 FCC Rcd at 8340-41 (emphasis added; citation omitted). More recently, the FCC reiterated its position that actions for unpaid service cannot and will not be maintained in the Commission. See Long Distance USA, Inc., et al. v. Bell Telephone Company of Pennsylvania, et al., DA92-10 at page 5 (released January 13, 1992). (Plaintiff attaches hereto for the Court's convenience copies of the FCC opinions cited in this brief).

The FCC itself thus rebuts defendant's primary jurisdiction argument. The Commission has made it clear that collection matters should be brought in court, not in the FCC. However, if defendant's position were correct and the Court stayed this lawsuit, plaintiff would have no available remedy. Such a result was not intended by Congress or the FCC, both of which have stated that plaintiff may seek collection of unpaid charges from defendant in this Court.

Furthermore, this Court already has considered, and rejected, defendant's primary jurisdiction argument. In an earlier action between the same parties herein involving a claim against defendant for unpaid facilities charges, defendant similarly moved for a stay based on its primary jurisdiction argument. Then Chief Judge Nangle denied the motion in a unpublished ruling from the bench and permitted the case to proceed. See Southwestern Bell Telephone

Company v. Allnet Communications Services, Inc., et al., No. 90-240-C-1. Other courts have also permitted actions analogous to the instant case to proceed in a judicial forum. See, e.g., Ivy Broadcasting Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968) (counterclaim for unpaid charges); RCA Global Communications, Inc. v. Western Union Telegraph Co., 521 F.Supp. 998 (S.D.N.Y. 1981) (denying motion to stay based on primary jurisdiction argument).

Defendant has provided an additional reason why its motion should be denied. In another case, defendant has stated that a district court has jurisdiction over a Communications Act claim when "the issues at hand are legal questions properly within the competence of this court." Allnet Communications Services, Inc. v. National Exchange Carrier Association, Inc., 741 F.Supp. 983, 984 (D.D.C. 1990). As more fully discussed below, the issues in the present case do not involve consideration of any esoteric or specialized matters beyond this Court's competency; quite the opposite is true. This case presents a straightforward claim for unpaid telecommunications service. Thus, by defendant's own admission, the issues herein are purely "legal questions" which the Court is more than competent to decide.

Finally, the underlying basis for defendant's primary jurisdiction argument is without merit. Plaintiff does not dispute that the FCC possesses certain competence and expertise which are a necessary part of the regulatory

scheme for the telecommunications industry. This case, however, does not implicate or necessitate that competence or expertise. Contrary to defendant's assertions, this case does not involve a question concerning the "reasonableness of rates." The tariff rates plaintiff has charged defendant for its service are presumptively valid and reasonable, as a matter of law, pursuant to the "filed tariff doctrine."[2] Defendant therefore is precluded from challenging in this Court the rates mandated by applicable tariffs. Consequently, the Court is not required to determine the reasonableness of any applicable tariff. The only material issues in this case are (1) how much service did plaintiff provide defendant; (2) what is the charge for such service, as mandated by the filed tariff; and (3) what does defendant owe for the service.

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[2]The Supreme Court first articulated the "filed tariff doctrine" in Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 43 S.Ct. 47 (1922). The doctrine evolved from an antitrust case and held that unless a tariff has been set aside, the rate for services set forth therein constitutes the legal rate for all purposes. 260 U.S. at 163, 43 S.Ct. at 49. See also Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S.Ct. 2759 (1990).

Courts have applied the doctrine in cases involving disputes under the Communications Act. See, e.g., Nordlicht v. New York Telephone Co., 799 F.2d 859, 866 (2nd Cir. 1986) ("the filed tariff doctrine requires [the phone company] to bill its phone calls in accordance with its tariffs and prevents [a customer] from making any challenge to these rates"); cf. H.J. Inc. v. Northwestern Bell Telephone Co., available on WESTLAW, 1992 WL 4841 (8th Cir., January 15, 1992) (discussing generally the filed tariff doctrine).

The practical effect of defendant's complaint in the FCC is to challenge the applicable tariffs. That challenge, however, does not and cannot preclude plaintiff from seeking in this Court remedies which have been created by Congress, required by the FCC to be enforced only in a court of law, and based on tariffs which are presumptively valid. Nothing in this lawsuit even remotely supports defendant's primary jurisdiction argument.

The parties' dispute is properly before the Court. Accordingly, for all the above reasons plaintiff requests the Court to deny defendant's motion to stay.

Respectfully submitted,

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed postage prepaid this 4th day of March, 1992, to David B.B. Helfrey, attorney for defendant, 226 South Meramec, Suite 200, St. Louis, Missouri 63105.

**Arner, Stephen M.**

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**U.S. District Court**

**Eastern District of Missouri (LIVE)**

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**Case Number:** 4:04-cv-319
**Filer:** Global Crossing Telecommunications, Inc.
**Document Number:** 19

**Docket Text:**
MEMORANDUM in Opposition re [14] MOTION to Dismiss Case *Based Upon the Doctrine of Primary Jurisdiction*, [17] MOTION to Stay re [14] MOTION to Dismiss Case *Based Upon the Doctrine of Primary Jurisdiction Alternative* filed by Plaintiff Global Crossing Telecommunications, Inc.. (Attachments: # (1) Exhibit A to Plaintif's Combined Memo in Opposition)(Solverud, Erik)

The following document(s) are associated with this transaction:

**Document description:**Main Document
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**4:04-cv-319 Notice will be electronically mailed to:**

Danny E. Adams dadams@kelleydrye.com,

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
| | ) | |
| **Global Crossing Telecommunications, Inc.** | ) | |
| **Southwestern Bell Telephone, LP** | ) | |
| | ) | **WC Docket No. 04-___** |
| **Referral from the United States District Court** | ) | |
| **for the Eastern District of Missouri** | ) | |
| **Case No. 4:04CV00319 ERW** | ) | |

**STATEMENT OF UNDISPUTED MATERIAL FACTS, STATEMENT OF ISSUE PRESENTED AND PROPOSED PROCEDURAL SCHEDULE**

Global Crossing Telecommunications, Inc. ("Global Crossing") and SBC Communications Inc. ("SBC") submit this statement of undisputed material facts, statement of issue presented and proposed procedural schedule in connection with the referral from the United States District Court of the Eastern District of Missouri of dispositive legal questions presented in the litigation between the parties involving the billing of terminating access charges with respect to wireless-originated communications.

**Introduction**

Global Crossing commenced an action against Southwestern Bell Telephone, LP ("SBT") in the United States District Court of the Eastern District of Missouri seeking, in addition to other relief, monetary damages based upon SBT's practice of billing terminating access charges based solely upon the originating and terminating telephone numbers of wireless-originated communications.[1] SBC moved to dismiss the case on the

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[1] *Global Crossing Telecommunications, Inc. v. Southwester Bell Telephone, LP,* No. 4:04CV00319 CV, Complaint (E.D Mo. filed March 17, 2004) ("Complaint").

basis of the doctrine of primary jurisdiction.[2] Global Crossing opposed the motion[3] and SBT filed a reply brief in support of its motion.[4]

The court granted SBT's motion, in part, stayed the case, and referred the matter to the Commission. In referring the matter, the court concluded:

> The Court agrees with Bell that the need to draw on the expertise of the Federal Communications Commission is paramount here, as is the need to promote uniformity and consistency within the telecommunications field. *See Access Telecomm, v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 608 (8th Cir. 1998). Global Crossing argues that because the Court need only interpret Bell's tariff, the Court should decide the issue. The Eighth Circuit rejected a similar argument in *Access*, recognizing an argument that Bell violated its tariff in that case implicated broader concerns about whether a classification within the tariff was reasonable and required delving into technical aspects of telecommunications service. Thus, the Eighth Circuit held that it was not an abuse of discretion for the district court to dismiss the action under the primary jurisdiction doctrine.[5]

In its ordering clauses, the court stayed the matter "pending a determination of the issues raised in Plaintiff's Complaint."[6] Thus, the court retained jurisdiction over the case for ultimate disposition pending resolution of the matters raised in the Complaint. As a

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2 *Id.*, Motion To Dismiss Based Upon the Doctrine of Primary Jurisdiction; Defendant's Memorandum of Law in Support of Its Motion To Dismiss Based Upon the Doctrine of Primary Jurisdiction (E.D. Mo. filed April 28, 2004) ("Def. Referral Mem."); SWBT's Alternative Motion To Stay Based Upon the Primary Jurisdiction Doctrine (E.D. Mo. filed April 28, 2004).

3 *Id.*, Plaintiff's Opposition to Motion To Dismiss (or in the Alternative Stay) Based Upon the Doctrine of Primary Jurisdiction (E.D. Mo. filed ____, 2004).

4 *Id.*, Defendant's Reply in Support of Its Motion To Dismiss (E.D. Mo. filed May 25, 2004)("Def. Reply").

5 *Id.*, Order at 3-4 (E.D. Mo. filed June 14, 2004) ("Referral Order").

The Order, together with the Complaint and the briefs cited above and the transcript of oral argument constitute the record before the District Court. A copy of this record is attached as an Appendix.

6 Order at 4.

result, the district court will ultimately decide the case, including liability and, if appropriate, damages.[7]

The court described Global Crossing's claim as whether:

> . . . Bell violated and continues to violate the Federal Communications Act of 1934, 47 U.S.C. sec. 151, *et seq.*, and Bell's federal tariff by using the caller's area code as the point of origin for determining the rate, and thereby charging Global Crossing intrastate rates for what are truly interstate calls.[8]

**GLOBAL CROSSING LANGUAGE:** The issue for the Commission to resolve, therefore, is whether SBT can determine jurisdiction of wireless telephone calls upon the basis of call detail, within the meaning of SBT's Interstate Tariff, where the call detail passed to SBC cannot identify the exact geographic origination points of wireless calls.

**SBC LANGUAGE:** Global Crossing's claim thus implicates the broad question of whether it is appropriate to jurisdictionalize wireless traffic, for purposes of charging terminating access, by using the actual call detail of the usage record sent by the access customer (*e.g.*, Global Crossing) to the terminating local exchange carrier (*e.g.* SBC).[9]

A key issue for the Commission to resolve, therefore, is whether SBT can determine jurisdiction of wireless telephone calls upon the basis of call detail, within the meaning of

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[7] At oral argument on the referral motion, SBT's counsel agreed with this procedural outcome of grant of the referral motion. *Id.*, Tr. of Hearing at 13 (E.D. Mo. June 8, 2004) (Mr. Medler: "In addition, Your Honor, I should also point out that we're not depriving the Plaintiffs of anything. We're not depriving them of their forum. We're not depriving them of their right to sue. We're not kicking them out of their day in court. They can bring this matter to the FCC, have it decided there. If they win, they can come back and claim all the damages that they want. So we're not eliminating their claim. We're just sending it to the appropriate agency to decide.").

[8] Order at 2-3.

[9] *See, e.g.*, Complaint ¶¶ 5, 12; *see also* Def. Referral Mem. at 5-6, 18-22; Def. Reply.

SBT's Interstate Tariff, where Global Crossing does not pass information to SBT identifying the exact geographic origination points of wireless calls.

Global Crossing and SBC present this statement of undisputed material facts, with appropriate citations to the record before the district court, a statement of the ultimate legal issue presented to the Commission in the court's Order and a proposed procedural schedule for briefing and resolution of this issue.

**Statement of Undisputed Material Facts**

**Parties**

1. Global Crossing is a Michigan corporation that is a nationwide interexchange carrier that provides, among other services, long distance telephone services in the states served by SBC, including, Arkansas, Kansas, Missouri, Oklahoma and Texas. [Complaint, ¶ 1.] Among other services, Global Crossing purchases from SBC interstate and intrastate terminating access services with respect to traffic that originates from wireless phones and terminates to SBC subscribers located in the states of Arkansas, Kansas, Missouri, Oklahoma and Texas. [Complaint, ¶¶ 7-9.]

2. SBT is a Texas limited partnership that provides, among other services, interstate and intrastate terminating access services to Global Crossing with respect to traffic that originates from wireless phones that terminate to SBT subscribers in the states of Arkansas, Kansas, Missouri, Oklahoma and Texas. [Complaint, ¶¶ 2, 7-9.]

**SBT's Assessment of Access Charges on Wireless-Originated Traffic**

3. This referral poses for resolution the issue of how SBT is to assess terminating access charges upon Global Crossing for traffic that originates from wireless phones and terminates to SBT's wireline subscribers. If such calls are jurisdictionally

interstate, then SBT is to assess terminating access charges in conformity with the rates, terms and conditions contained in its Tariff F.C.C. No. 73 ("Interstate Tariff"). If such calls are jurisdictionally intrastate, the rates, terms and conditions contained in the relevant SBT intrastate tariff are applicable. The determination of whether a particular call is interstate or intrastate is a matter of federal law to be determined, in the first instance, in accordance with applicable federal statutory provisions and Commission rules and regulations as well as the jurisdictional provisions (cited below) contained in SBT's Interstate Tariff. [Complaint, ¶ 10; Def. Referral Mem at 3-4, 9-11 ("[w]ith respect to the *critical wording in the federal tariff which determines the jurisdictional nature of the call,* the five state tariffs at issue here contain either identical or nearly identical wording to the federal tariff.") (*Id.*, at 9-10 (emphasis added.)); ("[t]his case relates to whether wireless originating calls carried by an IXC should be classified as interstate or intrastate, *a matter clearly within the province of the FCC.")* (*Id.* at 10-11 (emphasis added).)]

4. Cellular and other wireless mobile telephones are assigned telephone numbers associated with a particular geographic calling area. For example, a wireless subscriber in Missouri would have a number beginning with the 314 area code. Mobile phone customers, however, make calls while they are not physically located in the calling areas associated with their telephone numbers just as readily as they make calls while they are physically located in those calling areas. In other words, the mobility afforded by wireless networks allows mobile phone users to make calls while within or outside of the area or region associated with their mobile phone numbers. A Missouri wireless subscriber, for example, with a Missouri area code (314) can just as easily reach an SBT

subscriber in Missouri while in Missouri as he could reach that same SBT customer while traveling in Kansas. In both cases, the area codes of both the originating and terminating telephone numbers would be the same, even though, based on the physical location of each customer at the initiation of the call, one call travels across state boundaries and the other does not. [Complaint, ¶ 5; Def. Referral Mem. at 5-6.]

5. With respect to wireless-originated calls to wireline customers, SBT cannot determine, based solely upon the originating ANI, whether the physical location of the wireless customer is within the same state as the physical location of the called wireline customer. [Complaint, ¶ 16; Def. Referral Mem. at 5 ("The ANI associated with a cellular customer may be provided on such calls, but not the precise geographical location of the cellular customer making the call. SBC Missouri cannot determine from the ANI whether the caller, at the time he is talking, is in Missouri, Kansas, Colorado, Utah, Nevada or California.").]

6. When SBT is able to capture the ANI from the call detail, SBT will bill terminating access charges based upon the originating and terminating ANI. Thus, if a wireless caller who has a Missouri area code is actually driving in his car in Los Angeles and calls his mother in Kansas City, SBT bills terminating access on the call as if it were an intrastate call. [Def. Referral Mem. at 5.] Likewise, if a wireless caller who has a California area code is driving in his car in Kansas City, and calls his mother in St. Louis, SBT bills interstate terminating access for that call. SBT bills terminating access charges in this manner because "providing exact origination points of cellular calls with the ANI is not currently possible." [Def. Referral Mem. at 6.]

**Relevant Provisions of SBT's Interstate Tariff**

7. SBT's Tariff F.C.C. No. 73 provides in relevant part:

> For ... FGD... Switched Access Service, where jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage. The projected interstate percentage will be developed on a monthly basis, by end office, when the Switched Access service minutes (...FGD...) are measured by dividing the measured interstate terminating access minutes (the access minutes where the calling number is in one state and the called number is in another state) by total terminating access minutes.

[SBT Tariff F.C.C. No. 73, § 2.4.1(A)(2)(b); quoted in Def. Referral Mem. at 8.]

8. SBT's Interstate Tariff further provides:

> For ... FGD... Switched Access Services, where call details are insufficient to determine jurisdiction, the customer will provide the interstate percentage of ... FGD terminating access minutes from each end office or LATA from which the customer may terminate traffic. If a LATA-level PIU factor is provided by the customer, the specified percentage will be applied to all end offices to which the customer may terminate traffic within the LATA or to those end offices for which an end office-level PIU is not provided.

[*Id.*]

**Statement of Issue Presented**

9. The following dispositive question of law is responsive to the court's referral:

**Global Crossing's Position**

> On the basis of the undisputed facts presented above, the language of SBT's Interstate Tariff and the usual and customary aids to tariff/contract construction, which provision of the SBT Interstate Tariff quoted above applies in the case of wireless originated calls?

**SBC's Position**

> Based on prior Commission precedent, industry practice, the nature of wireless communications, and the provisions of SBC's tariffs, is it reasonable and appropriate for SBC to jurisdictionalize wireless

traffic for purposes of charging terminating access by using the actual call detail of the usage record provided by the interexchange access customer to SBC?

**Proposed Procedural Schedule**

**Global Crossing Position**

10. The parties agree that this referral be treated as a petition for declaratory ruling. Because this referral involves private litigation between Global Crossing and SBC, Global Crossing requests that the proceeding as restricted for *ex parte* purposes pursuant to 47 C.F.R. § 1.1208, and that the matter be resolved without public notice to and comments from the industry as requested by SBC. The narrow issue here is the legal interpretation of SBT's interstate Tariff. The issue was referred to the Commission by the district court because of the Commission's expertise in addressing such matters in the first instance and not because of need for the views of the telecommunications industry, to the extent the industry's views even would be relevant to interpreting SBT's Tariff. Besides being unnecessary, public notice and comment would only delay resolution of the reference and, as a consequence, the federal court proceeding as to which Global Crossing is entitled to a speedy and inexpensive determination as a matter of law.

11. Global Crossing proposes the following briefing schedule:

Initial Brief of Global Crossing due September 3, 2004;

Response Brief of SBC due September 17, 2004

Reply Brief of Global Crossing due September 27, 2004.

**SBC Position**

10. The parties agree that this referral be treated as a petition for declaratory ruling on the issue presented. This issue is part of broader intercarrier compensation

issues presently being considered by the Commission. Moreover, the question of terminating access for wireless originated traffic should not be considered in isolation from the manner in which other wireless traffic is jurisdictionalized for intercarrier compensation purposes, including wireless terminated traffic. Finally, ILECs have substantially similar federal tariffs concerning terminating access, and the Commission's decision on the dispute between Global Crossing and SBC will have implications for carriers throughout the industry. For all these reasons, the Commission should issue a public notice requesting comments from the industry, as it did in WT Docket No. 01-316, which also involved a United States district court referral of an intercarrier access charge issue. In that case, although the dispute was between AT&T and Sprint only, the Commission issued a Public Notice seeking comments from the industry. SBC requests that the proceeding be treated as permit-but-disclose for *ex parte* purposes pursuant to 47 C.F.R. § 1.1206.

11. The parties propose the following briefing schedule:

Commission issues Public Notice August 30 , 2004

Comments due September 17, 2004

Replies due October 8, 2004

Respectfully submitted,

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2. General Regulations (Cont'd)

2.4 Jurisdictional Reports (Cont'd)

2.4.1 Percentage of Interstate Use (PIU) for Arkansas, Kansas, Missouri and Oklahoma (C) (C)

(A) Report Requirements for Ordering Access Services

(1) **Originating and Terminating FGA, FGB, BSA-A and BSA-B Services**

Upon ordering FGA, FGB, BSA-A or BSA-B Switched Access Services where call details are insufficient to determine jurisdiction, the customer will provide an interstate percentage of FGA, FGB, BSA-A or BSA-B originating and terminating access minutes for each end office or LATA from which the customer may originate or terminate traffic. If a LATA-level PIU factor is provided by the customer, the specified percentage will be applied to all end offices from which the customer may originate or terminate traffic within the LATA or to those end offices for which an end office-level PIU is not provided. (T) (T)

For FGA, FGB, BSA-A and BSA-B, the customer may provide a PIU factor for each Billing Account Number (BAN) within the LATA in lieu of an end office-level PIU. If a LATA-level PIU factor is provided by the customer, the specified percentage will be applied to all BANs for which a BAN-level PIU is not provided. (T)

Pursuant to Federal Communications Commission Order FCC 85-145 (adopted April 16, 1985), when the customer does not have sufficient data to determine jurisdiction, the percent interstate usage is to be developed as though every call that enters the customer's network at a point within the same state as that in which the called station is situated (as designated by the called station number) is an intrastate communication. Every call for which the point of entry is in a state other than that where the called station is situated (as designated by the called station number) is an interstate communication.

2. General Regulations (Cont'd)

2.4 Jurisdictional Reports (Cont'd)

2.4.1 Percentage of Interstate Use (PIU) for Arkansas, Kansas, Missouri and Oklahoma (Cont'd) (C) (C)

(A) Report Requirements for Ordering Access Services (Cont'd)

(2) **Originating and Terminating FGC, FGD, BSA-C and BSA-D Switched Access Services**

(a) Originating

For FGC, FGD, BSA-C or BSA-D Switched Access Services, where jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage. The projected interstate percentage will be developed on a monthly basis, by end office, when the Switched Access Service access minutes (FGC, FGD, BSA-C and BSA-D) are measured by dividing the measured interstate originating access minutes (the access minutes where the calling number is in one state and the called number is in another state) by the total originating access minutes.

2. General Regulations (Cont'd)

2.4 Jurisdictional Reports (Cont'd)

2.4.1 Percentage of Interstate Use (PIU) for Arkansas, Kansas, Missouri and Oklahoma (Cont'd)

(A) Report Requirements for Ordering Access Services (Cont'd)

(2) Originating and Terminating FGC, FGD, BSA-C and BSA-D Switched Access Services (Cont'd)

(b) Terminating

For FGC, FGD, BSA-C or BSA-D Switched Access Services, where jurisdiction can be determined from the call detail, the Telephone Company will bill according to such jurisdiction by developing a projected interstate percentage. The projected interstate percentage will be developed on a monthly basis, by end office, when the Switched Access Service access minutes (FGC, FGD, BSA-C and BSA-D) are measured by dividing the measured interstate terminating access minutes (the access minutes where the calling number is in one state and the called number is in another state) by the total terminating access minutes.

For FGC, FGD, BSA-C and BSA-D Switched Access Services where call details are insufficient to determine jurisdiction, the customer will provide an interstate percentage of FGC, FGD, BSA-C or BSA-D terminating access minutes for each end office or LATA from which the customer may terminate traffic. If a LATA-level PIU factor is provided by the customer, the specified percentage will be applied to all end offices to which the customer may terminate traffic within the LATA or to those end offices for which an end office-level PIU is not provided. (Ty) (Ty) (Ty)

(Dy) (Dy)

x Reissued material became effective October 28, 1998.

y Issued under authority of Special Permission No. 98-242 of the F.C.C. in order to withdraw material without its becoming effective.

2. General Regulations (Cont'd)

2.4 Jurisdictional Reports (Cont'd)

2.4.1 Percentage of Interstate Use (PIU) for Arkansas, Kansas, Missouri and Oklahoma (Cont'd)

(A) Report Requirements for Ordering Access Services (Cont'd)

(2) Originating and Terminating FGC, FGD, BSA-C and BSA-D Switched Access Services (Cont'd)

(b) Terminating (Cont'd)

If the customer does not provide the Telephone Company with a PIU factor for their terminating FGD or BSA-D traffic, the Telephone Company will develop a PIU factor for such terminating access minutes by utilizing the data used to develop the PIU for any other terminating FGD or BSA-D usage at that end office. The Telephone Company developed percentage will be based on the average of the customer's other terminating FGD and/or BSA-D usage where jurisdiction can be determined for the call detail. (Ty)

If the customer does not provide the Telephone Company with a PIU factor for their terminating FGC or BSA-C traffic or if the customer has no additional terminating FGD or BSA-D traffic within that end office from which a PIU factor can be developed, the Telephone Company will develop a PIU factor for such terminating access minutes utilizing the data used to develop the PIU for the originating access minutes. The Telephone Company developed percentage will be based on the average of the customer's originating FGC, FGD, BSA-C or BSA-D usage. (Ty)

If the customer has no originating traffic within the end office for which sufficient call detail exists to develop an interstate percentage, the Telephone Company will designate a PIU factor of 50% for FGC, FGD, BSA-C or BSA-D terminating access minutes. (Ty)

(3) Dedicated Network Access Link (DNAL) BSA

Upon ordering Switched Access DNAL BSA, the customer will provide an interstate percentage of use for each DNAL BSA requested.

x Reissued material became effective October 28, 1998.

y Issued under authority of Special Permission No. 98-242 of the F.C.C. in order to withdraw material without its becoming effective.